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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1152

JOHN DWAIN DUGGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPLICATION FOR RELEASE ON BOND PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

JOHN DWAIN DUGGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Dwain Dugger, by and through his attorneys of record, presents his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, and states:

(a) OPINION BELOW

The opinion below is not yet officially or unofficially reported. A copy of that opinion is appended hereto. Also appended hereto is the unreported Memorandum and Order of the United States District Court for the Western District of Arkansas.

(b) GROUNDS FOR JURISDICTION

Petitioner seeks to have reviewed an order of the United States Court of Appeals for the Eighth Circuit, dated November 6, 1969, in Cause No. 19,664 therein, affirming an order of the United States District Court for the Western District of Arkansas, Fort Smith Division, dated February 12, 1969, denying Petitioner's "Motion to Vacate or Correct Sentence or in the Alternative for Reduction of Sentence" without an evidentiary hearing. This petition is presented under the authority of *Section 1254, Title 28, United States Code* and within the time prescribed by *Section 2101*(c), *Title 28, United States Code*

(c) QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether or not the trial court, in a proceeding instituted under Section 2255, Title 28, United States Code, erred and denied due process of law in failing to hold an evidentiary hearing to determine if any items seized from the premises of a co-defendant would or could have been beneficial to the defense?

(d) CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional Provisions, statutes and rules involved are as follows:

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . . ."

Section 2255, Title 28, United States Code:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral

attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, Section 114, 63 Stat. 105."

Federal Rules of Criminal Procedure, Rule 16, Title 18, United States Code:

* * *

"(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, building or places, or copies or portion thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this

rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C., Section 3500.

(e) Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to appellate court in the event of an appeal by the defendant.

* * *

As amended February 28, 1966. eff. July 1, 1966."

(e) STATEMENT OF THE CASE

The Petitioner was originally convicted after a trial by jury of nine counts of transporting stolen motor vehicles in interstate commerce, in violation of *Section 2312, Title 18, United States Code,* and one count of conspiracy to commit such offenses. He was sentenced to a total of ten years in the custody of the Attorney General. Petitioner, along with his co-defendant, Otto Lewis Meyer, appealed that judgment of conviction to the United States Court of Appeals for the Eighth Circuit, which affirmed on June 18, 1968, and denied rehearing on August 27, 1968. *Meyer* v. *United States,* (8th Cir. 1968) 396 F.2d 279. Certiorari was

denied by the United States Supreme Court on January 13, 1969. *Dugger* v. *United States*, 393 U.S. 1017, 21 L.Ed. 2d 561.

Petitioner's motion to vacate or correct sentence, under *Title 28, Section 2255, United States Code* and *Federal Rules of Criminal Procedure, Rule 35, Title 18, United States Code,* was filed below on February 11, 1969, and was denied without evidentiary hearing on February 12, 1969 by written opinion incorporating two written opinions rendered upon the motion of Meyer.

Prior to the charging of Petitioner and his co-defendants, a search warrant was applied for and issued by the United States Commissioner in Jefferson City, Missouri. The search warrant was served and the farm and house of co-defendant Otto Lewis Meyer was searched and one box of papers and two sacks of papers were seized. Dugger and Meyer were tried jointly and although none of the documents seized were introduced in evidence during the trial by the Government, none of the documents and records were returned to the defendants. The defendants offered evidence that these records were necessary to their defense. Dugger's own records were missing, having been either lost or also confiscated. Prior to trial the defendants filed a Motion for Discovery and Inspection under *Federal Rules of Criminal Procedure, Rule 16(b), Title 18, United States Code,* which was denied. The Government's testimony was that the papers seized were of no value to the defense and were not relevant to the transactions charged but the Government still refused and failed to return them to Meyer or allow the Petitioner to examine them to make their own determination of their relevancy and value. The trial court made no in camera inspection of the items seized, as authorized by *Rule 16(e)*. and the Government has still, to this date. failed to return these items.

Among the grounds raised in Petitioner's post-trial motion was that the search warrant and supporting affidavit was insufficient and defective in describing the place to be searched and the things to be seized, and that he was deprived of his right to adequately prepare for his defense by the trial court's denial of his motion to inspect the items seized as a result of this search.

(f) ARGUMENT

On August 12, 1966, F.B.I. Agent Rowen B. Ayers, filed his affidavit for Search Warrant before the United States Commissioner in Jefferson City, Missouri, and a Search Warrant was issued. In both the place to be searched was described as, "80 acres in name of Otto Lewis Meyer and Margie M. Meyer described as the W 1/2 of NE 1/4 of Section 23, R.19, Twp. 45, in Morgan County . . .", and the things to be searched for and seized were described as, "1961 Lincoln Continental Motor Vehicle painted yellow and various other vehicles the description of which are not known. (2) Materials, tools and equipment which have been or could be used in the manufacture of fraudulent identification numbers for motors, frames and motor vehicle identification plates. (3) Forms, equipment, seals and materials which may have been used or could be used in preparing fraudulent Bills of Sales, Registrations or other items necessary to title a motor vehicle." The Fourth Amendment to the United States Constitution provides that, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The affidavit supporting the issuance of the search warrant does not set forth any probable cause to believe any of the items sought to be seized, other than perhaps the

1961 Lincoln, were present on the premises. It is likewise obvious that the search warrant fails to describe the things to be seized with particularity, but authorizes an exploratory and general search, and is therefore insufficient and the search was unconstitutionally unreasonable. See *Marron* v. *United States*, (1927) 275 U.S. 192, 196; *United States* v. *Lefkowitz*, (1932) 285 U.S. 452; *Giordenello* v. *United States*, (1958) 357 U.S. 480; and *Stanford* v. *Texas*, (1965) 379 U.S. 476.

In the recent decision of *Alderman* v. *United States*, (1969) 394 U.S. 165, 22 L.Ed.2d 176, the Supreme Court held that a co-defendant has no special standing to object to a violation of *Fourth Amendment* rights as a "person aggrieved." In our present case, however, items seized were not used in evidence against the defendants (except for two books of blank order forms and rubber stamp) and it is Petitioner's position that because of the unconstitutional search and seizure the documents and records seized were not available to him for use in his defense. Thus he was aggrieved by the search and seizure if any of the items seized would have or could have been beneficial to him in his defense.

In *Brady* v. *Maryland*, (1963) 373 U.S. 83, 10 L.Ed.2d 215, the Supreme Court held that it was a violation of due process of law where the prosecution suppresses and fails to reveal evidence favorable to an accused where such evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.

Prior to trial Petitioner filed a Motion for Discovery and Inspection seeking, among other things, to inspect any books, papers, documents or tangible objects which were seized during the search of co-defendant Meyer's 80 acres, and alleged that he could not properly prepare for trial without an opportunity to inspect and copy those items.

The Government resisted that motion and the trial court denied the motion without stating its reasons for doing so.

During the trial Meyer testified that he had purchased the allegedly stolen cars from a salesman of a Chevrolet dealer and then sold them to Petitioner (Trial Transcript 279). He testified that his records would reveal the dates of these transactions (Trial Tr. 276-277) and the amounts he paid for the automobiles and the amounts he sold them for (Trial 279). Petitioner testified that his own personal records were missing (Trial Tr. 292) and Meyer's records were seized as a result of the service of the search warrant (Tr. 265, 266, 268, 279, 282). Of course, had the defendants been able to inspect the seized documents and if the records did show the dates of the purchases and amounts paid these records would certainly have corroborated the testimony of the defendants and may well have led the jury to believe the defendants and thus resulted in an acquittal. These records might well have led to the discovery of other exculpatory evidence. If there was evidence favorable to the defendants within the items seized Petitioner's right to a fair trial was prejudiced, and he was denied due process as guaranteed by the *Fifth Amendment.*

Agent Ayers testified that none of the items seized were of any value to the defense (Trial Tr. 216-217), but this being an adversary proceeding, the Petitioner should not be bound by what his opponent says as to the relevancy of the items seized. If they were of no value to the defense, and were not used in evidence by the Government, why were they not returned? Why did the Government resist the Petitioner inspecting them? What did the Government have to hide? In *Kolod* v. *United States,* (1968) 390 U.S. 136, 19 L.Ed.2d 962, this Court, in reversing for a further hearing in the District Court, said loc. cit. 964, "We cannot

accept the Department's ex parte determination of relevancy in lieu of such determination in an adversary proceeding in the District Court." *Rule 16(e)* makes provision for an in camera inspection by the court. Neither procedure was followed. The District Court, prior to the original trial summarily denied Petitioner's request for an inspection. Upon appeal this court held that this was not error and not an abuse of discretion. Petitioner suggests that, like the prosecution, the court has no discretion to suppress evidence favorable to the defense.

The receipt given Meyer's wife showed the seizure of a box of papers and two sacks of papers (Trial Tr. 318). Someone, other than the prosecution, should determine whether there has been a suppression of favorable evidence and that is what Petitioner has sought ever since this cause was filed against him in August of 1966. Petitioner sought such a determination by the court below in his 2255 proceeding but was again unsuccessful. In camera inspections are not only authorized by *Rule 16(e)*, but have been used in many other instances. See *Dennis* v. *United States,* (1966) 384 U.S. 855, 16 L.Ed.2d 973 (grand jury minutes), *Palermo* v. *United States,* (1959) 360 U.S. 343, 3 L.Ed.2d 1287 (Jencks Act), *Roviaro* v. *United States,* (1957) 353 U.S. 53, 1 L.Ed.2d 639 (informer's identity). Thus one possible procedure would be for the trial court to have made an in camera inspection of the items seized to determine if they would be of use to the defense, and if it ruled adversely to Petitioner, they should have been sealed and upon appeal forwarded to the Court of Appeals for its review.

Petitioner however suggests that the correct procedure below would have been to allow him to inspect the items seized and if he believed any item or items would have been favorable or usable by the defense, then there should be an adversary hearing and if the trial court concurs, a

new trial should have been granted. In *Dennis* v. *United States,* supra, this court said, loc. cit. 875, "trial judges should not be burdened with the task or responsibility of examining sometimes voluminous grand jury testimony," and that it is not "realistic to assume that the trial court's judgment as to the utility of materials for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities." Certainly, only Petitioner would know, at least at the outset, what would be of value to him in his defense. The trial court would not and could not know what items might "jog the memory" of Petitioner or lead him to the discovery of other evidence essential or favorable to his defense. In the "eavesdropping" cases the Supreme Court, in *Alderman* v. *United States,* supra, has held that it is for the defendant, and not the trial court, to make the initial inspection and determination. As said there, 22 L.Ed.2d loc. cit. 192, "An apparently innocent phrase or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great to rely wholly on the camera judgment of the trial court. . . ."

Nor is the problem avoided by saying that Petitioner must first point out to the court what items seized could have been used by him. All he knows is that a box and two sacks of papers pertaining to Meyer's automobile sales transactions were seized by the Government, and although the Government said they wouldn't help him in any way, it is still fighting hard to keep him from seeing them. He is in much the same position as a student taking a compet-

itive examination with his competitor having the "Key" and grading the papers.

Petitioner strongly urges the adoption of defendant to inspect any items seized from himself or his co-defendant. Obviously such items are seized for one of two reasons. Either to use in evidence against the defendants or to keep the defendants from using such evidence. If it is the latter it would violate *Brady* v. *Maryland*, supra. Here the papers and records were not used by the Government during the trial, but they have not, even as of today, been returned and there has been no claim that they were contraband.

Petitioner's motion was filed under *Section 2255, Title 28, United States Code*, and this Court recently held that claims of an unconstitutional search and seizure may be raised in such a motion for the first time. *Kaufman* v. *United States*, (1969) ..... U.S. ....., 22 L.Ed.2d 227. The guidelines for hearings on a 2255 motion were set out in *Sanders* v. *United States*, (1963) 373 U.S. 1, 10 L.Ed.2d 148. In our present case the files and records of the case cannot conclusively show that Petitioner was not entitled to relief, and therefore the District Court erred in denying the motion without a hearing.

The District Court did not make any findings of fact or conclusions of law, but in effect overruled Petitioner's motion by incorporating two orders which denied Meyer's post-trial motions, primarily for the reason that a search and seizure could not be raised in a 2255 motion. This position was overruled in *Kaufman* v. *United States*, supra.

The Court of Appeals, in affirming the denial of Petitioner's post-trial motion, held that this was not a *Brady* v. *Maryland* situation, yet that Court did not have before it the seized items for its examination. How can anyone, whether the Court of Appeals, the trial court, or this Peti-

tioner, know if there was seized any evidence favorable to the Petitioner without at least examining those items.

Petitioner respectfully suggests that the question presented herein is one that should be settled and passed upon by this Court. The rulings of the Court of Appeals below so departs from the ideals of fundamental fairness that it is a denial of due process of law. Petitioner respectfully suggests that this Honorable Court should review this cause and rule that where there has been a seizure of a co-defendant's papers and effects that another defendant should be entitled to inspect such seized items to determine if any such items would be, or lead to, favorable evidence to the defense; and that where the issue of suppression of favorable evidence has been raised in a post-trial motion that the trial court should either allow the movant to examine such seized items or for the trial court to make such an examination, particularly, where as here the movant has designated the particular evidence to be examined and the Government has admitted that it retains such items but has not offered them in evidence.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN DWAIN DUGGER,
Defendant.

Criminal No. 6163

Memorandum and Order

On February 11, 1969, the defendant filed two motions: (1) "Motion to Vacate or Correct Sentence or in the Alternative for Reduction of Sentence," and (2) "Motion for Stay of Execution of Sentence or for Release upon Bail Bond."

The motion to vacate or correct sentence or in the alternative for reduction of sentence is very similar to a motion filed October 9, 1968, by Otto Lewis Meyer, a co-defendant of John Dwain Dugger. On October 18, 1968, the court denied the motion and directed that the defendant Meyer surrender himself on October 22, 1968, to the custody of the United States Marshal for the Western District of Arkansas in execution of the judgment and sentence imposed upon him. When this memorandum and order was filed, counsel for Meyer orally requested that he be permitted to file an amended motion, which was filed November 4, 1968. On November 8, 1968, the amended motion was denied, and the defendant Meyer was ordered to surrender himself to the custody of the Marshal on November 22, 1968. Meyer has appealed to the United States Court of Appeals for the Eighth Circuit from said orders, which appeal is pending.

A copy of each of the memorandum and orders of October 18, 1968 (Exhibit A) and of November 8, 1968 (Exhibit B) (unpublished) are attached hereto and made a part hereof.

In view of the similarity of the motion and amended motion of Meyer and the motion of the movant Dugger, the court believes it is unnecessary to discuss at length the Dugger motion since they were co-defendants and tried on the same indictment. See, Meyer v. United States, and Dugger v. United States, (8 Cir. 1968) 396 F.2d 279.

The only difference in the procedures followed by Meyer and Dugger is that, following the affirmance of the judgment of conviction, Meyer resorted to the filing of the motions hereinbefore referred to, which were disposed of as set forth in Exhibits A and B. Dugger did not follow that procedure, but on or about November 24, 1968, filed his petition for certiorari in the United States Supreme Court. On January 13, 1969, the Supreme Court denied his petition for writ of certiorari, and following such denial the present motions of Dugger were filed.

The motion of Dugger to vacate or correct the sentence or in the alternative for reduction of sentence should be denied for the reasons stated by the court in Exhibits A and B hereto attached.

The second motion of Dugger for stay of execution of sentence or for release upon bail bond is based largely upon the fact that Meyer has appealed from the orders of this court (Exhibits A and B), and has been granted bond pending the appeal. In the second numbered paragraph of the motion, it is stated:

> "* * * Otto Louis Meyer, has previously filed herein a similar motion, which said motion is presently pending upon appeal in the United States Court of Appeals

for the Eighth Circuit and that upon that motion and appeal the defendant, Otto Louis Meyer, is free on bond."

The bond which was granted by the United States Court of Appeals, inter alia, provides:

"The conditions of this bond are that the appellant, Otto Lewis Meyer, is to appear in the United States District Court for the Western District of Arkansas at Fort Smith, and the United States Court of Appeals for the Eighth Circuit, in accordance with all orders and directions of said Courts as may be given or issued;

"That defendant is not to depart from the Western District of Missouri, except in accordance with such orders as may be issued by the United States District Court for the Western District of Arkansas;

"And, further, that defendant is to abide any judgment entered in such matter by surrendering himself to serve any sentence imposed, and obeying any order or direction in connection with such judgment as the court may prescribe.

"If the defendant appears as ordered and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform, payment of the amount of this bond shall be due forthwith."

Since Meyer and Dugger were jointly indicted and each convicted and sentenced to ten years in prison, the court is of the opinion that the same rule should be applied to both of them. Therefore, the motion for stay of execution and for release on surety bail bond should be granted conditioned upon his appearance in this court in accordance with orders and directions as may be given or issued. The court has prepared a form of bond and it is being transmitted with a copy of this order to the attorney for the movant. Upon execution of said form of bond

and approval by this court, the defendant will be released in accordance with the provisions of the bond.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion of John Dwain Dugger to vacate or correct sentence or in the alternative for reduction of sentence be and the same is denied; and the motion of John Dwain Dugger for stay of execution of sentence or for release upon bail bond is granted as hereinbefore set forth.

This 12th day of February, 1969.

/s/ Jno. E. Miller
United States Senior District Judge, Sitting by Designation

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OTTO LEWIS MEYER,
Defendant.

Criminal Action No. 6163

Memorandum and Order

On October 9, 1968, the defendant filed a "Special Plea and Motion" to set aside the verdict and judgment in this case and for a new trial. No jurisdictional allegation is contained in the motion, but the court is treating it as a motion under 28 U.S.C.A. §2255.

The movant and one John Dwain Dugger were convicted under a ten-count indictment, nine of which counts charged transportation of stolen motor vehicles in inter-

state commerce in violation of 18 U.S.C.A. §2312, commonly called the Dyer Act, and one count charging conspiracy to accept and agree to accept motor vehicles stolen in various places in the United States outside the State of Arkansas for the purpose of transporting said vehicles into Arkansas for sale in violation of 18 U.S.C.A. §§ 2, 371 and 2312. Upon the jury's verdict of guilty on all ten counts, the court sentenced these defendants to a term of two years on each of the first five counts, said sentences to run consecutively, and a sentence of two years on Counts 6 through 10 to run concurrently with the sentences on the first five counts.

The defendant appealed, and on June 18, 1968, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the lower court, 396 F.2d 279. On the appeal the defendant made two contentions: (1) the trial court erred in denying his motion for acquittal at the close of all the evidence because the verdict was not supported by substantial or sufficient evidence in that there was not sufficient evidence that the allegedly stolen automobiles were the same automobiles which the appellant possessed in Arkansas; and (2) the trial court erred in denying the appellant's motion for discovery and inspection which substantially prejudiced the appellant in the preparation of his defense.

Prior to the trial a search warrant was issued and certain premises of the defendant located in Missouri were searched, and the defendant contends that the search warrant was illegal and void on its face, and that the evidence seized by virtue of the allegedly illegal search and seizure was introduced during defendant's trial to his prejudice in violation of his constitutional right.

The Court of Appeals fully reviewed the record, and set forth in some detail the evidence that was introduced

at the trial. At page 282 of 396 F.2d the court stated that, after carefully considering the evidence adduced in connection with all the counts in the indictment, it was "thoroughly convinced that the evidence presented in each count was sufficient to establish the identity of the automobiles which defendants transported or caused to be transported into Arkansas, and that it was sufficient in all respects to sustain the convictions."

As to the contention of the appellant that the trial court erred in refusing to grant his motion for discovery and inspection of certain records under Rule 16, Fed.R.Crim.P., the court at page 283 said:

> "The learned trial court held that the motion was clearly insufficient. In any event, under the rule the production of such records is discretionary with the trial court, and there was no abuse of discretion here. The defendants urge that the books and records seized by the Government at Meyer's garage were necessary in the preparation of their defense, but we are not persuaded. A Government witness who executed the search warrant testified that he did not seize, or even find, ledgers or records of that sort. While the Government did seize some bank statements, Meyer himself testified that he always paid cash for cars, so it is difficult to see how his cancelled checks would have been of any value to him. Neither was it shown that there were any other papers seized which would have been beneficial in the preparation of the defense.
>
> "While the Government was under no legal compulsion to furnish the records in its possession, yet under a motion for bill of particulars it did in response furnish defendants a work sheet prepared by the FBI containing information concerning thirty-nine automobiles alleged to have been transported by defendants, identifying the automobiles on the work sheet which corresponded to the cars in each count of the indict-

ment by the chronological number on the list. This work sheet information included a description of each car, the public identification number, the true identification number, the title number, the date issued, the date and place stolen, the name of the person or company to whom it was sold, the date it was sold, the name and address of the person or company to whom it was resold and the name and address of the person or company in whose possession it was located. This information amply sufficed to permit defendants to adequately prepare for trial and consequently no prejudice could possibly have resulted to defendants by the court's refusal to grant their motion, which, as we have already noted, was discretionary."

Following the affirmance of the judgment, the appellant filed a motion for rehearing or "for reconsideration by the court en banc," and in support of the motion submitted a brief on June 27, 1968. A few days later appellant submitted a supplemental petition for rehearing and submitted another brief. Both petitions were denied by the Court of Appeals.

In support of the motion now before the court, the defendant cites Gerahty, et al., v. United States, (4 Cir. 1928) 29 F.2d 8; United States v. Yablonsky, (D.C. 1925) 8 F.2d 318; Giacolone v. United States, (9 Cir. 1926) 13 F.2d 108; United States v. Schullek, (W.D.Pa. 1930) 46 F.2d 532; Johnson v. United States, (6 Cir. 1931) 46 F.2d 7; and Rose v. United States, (8 Cir. 1930) 45 F.2d 459.

The cases cited do not support the present contention of defendant. The cases were either direct attacks upon the search warrant in the trial court or were considered by the appellate court by direct appeal.

The contentions now made by defendant can only be raised on appeal, and may not be raised for the first time by a proceeding under 28 U.S.C.A. §2255. In White v.

United States, (D.C. Cir. 1956) 235 F.2d 221, the court at page 222 said:

> "That a failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right is a principle too well established to require citation but we refer on this point to 58 A.L.R. 1286.
>
> "In Barber v. United States, 10 Cir., 1956, 197 F.2d 815, the Court, in a §2255 proceeding, held that any error involving evidence taken as the result of an illegal seizure could only be challenged on appeal 'and may not be raised for the first time by a proceeding under §2255.' See cases there cited.
>
> "In Davis v. United States, 7 Cir., 1954, 214 F.2d 594, 596, appellant had filed a §2255 proceeding. Appellant's motion to set aside his conviction and sentence alleged, among other things, that the arresting officers procured evidence against him by means of and through illegal search and seizure. The court, in dismissing the appeal, stated:
>
> > " 'It is settled law that a motion for vacation of a judgment and sentence under 28 U.S.C. §2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights, including such as are complained of in appellant's allegations. [Citing cases.].' "

In Cox v. United States, (8 Cir. 1965) 351 F.2d 280, the court at page 281 said:

> "Complaint of illegal arrest is not a proper matter to be considered on a §2255 motion. Such issue can only be properly presented and determined at the trial resulting in the conviction or upon direct appeal from such conviction. Warren v. United States, 8 Cir., 311 F.2d 673, 675; Washington v. United States, 8 Cir., 292 F.2d 452, 453.

"Likewise, the illegal search and seizure issue cannot be considered on a §2255 motion where, as here, the circumstances of the search and seizure were fully known to the defendant at the time of his trial resulting in his conviction. In Springer v. United States, 8 Cir., 340 F.2d 950, 951, we said:

> " 'It is abundantly clear that at the time of the introduction of the claimed tainted evidence Springer was fully aware of the manner in which the records were obtained, however, Springer and the other convicted offenders failed to raise the illegal search and seizure issue in their appeal from the judgment of conviction. This leads us to once again observe that a §2255 proceeding does not serve the office of an appeal. Butler v. United States, 340 F.2d 63 (8 Cir. 1965) and cases there cited; Glouser v. United States, 296 F.2d 853, 856 (8 Cir. 1961). And it is settled that the question whether evidence was seized illegally ordinarily may not be successfully raised in a proceeding which constitutes a collateral attack on the sentence, but must be presented in the appeal from the conviction.' "

See, also, Wilkins v. United States, (D.C.Cir. 1958) 258 F.2d 416; Martin v. United States, (D.C.Cir. 1957) 248 F.2d 651.

The contentions made by defendant were again considered in Holt v. United States, (8 Cir. 1962) 303 F.2d 791, and were denied. At page 793 the court said:

> "It is firmly established that the remedy provided by Title 28, U.S.C.A. §2255, cannot be used to serve the function and purposes of an appeal." (Citing cases.)

In paragraph 5 of the motion the defendant frankly admits that there was no appropriate Motion to Suppress or any objection to the introduction of unlawfully obtained evidence. In paragraph 6 of the motion he alleged:

> "In view of the above and the failure to disclose to this Court the violations of the constitutional rights of

> this defendant, Otto Lewis Meyer, this defendant is compelled to and hereby does invoke his solemn contention, that his rights under and provided for by the VI Amendment of the United States Constitution, which provides and guarantees 'Effective Assistance of Counsel' and which is fully discussed in the case of Glasser v. U.S., 315 U.S. 60. The record of this case fully justifies the conclusion that trial counsel for the defendant failed to make any record by motion or objection and such ineffectiveness could only constitute no 'Effective assistance of Counsel,' in a matter as serious as the one at hand and therefore is judicially tantamount to no counsel at all."

Assuming that the contention of the defendant to the effect that the attorney who represented him at the trial was incompetent is reviewable in this proceeding, the court has thoroughly reviewed the entire file and is convinced that the defendant received zealous and competent representation from his attorney. The evidence of the guilt of the defendant was overwhelming, and as a matter of law no illegal evidence was admitted. He was represented by Mr. Lewis E. Pierce, an attorney of Kansas City, Missouri, who was employed by the defendant, Otto Lewis Meyer, and his co-defendant, John Dwain Dugger. Mr. Pierce was fully aware of all the evidence and all documents that were introduced in evidence, and he should not be charged with incompetence.

In Barber v. United States, (10 Cir. 1955) 277 F.2d 431, the court, beginning at the bottom of page 432, said:

> "Neither is appellant's contention that his counsel was incompetent and did not apprise him of his rights worthy of consideration. It has been held that one who has been convicted may not have the sentence entered against him set aside and his case tried over by claiming that the attorney whom he selected did not properly represent him. In Moss v. Hunter, 10 Cir., 167 F.2d 683, 684, we said: 'In sum, petitioner's complaint that he did not have adequate representation

> is based on his present belief that he was not competently and skillfully represented. But, one who appears before the court with counsel employed for his defense is not deprived of his constitutional right to the assistance of counsel merely because in retrospection he concludes that such representation did not meet his standards of effectiveness.' "

In Cofield v. United States, (9 Cir. 1959) 263 F.2d 686, the court at page 689 said:

> "Where, as here, this question arises in the context of a proceeding to vacate a sentence fair on its face, the indicated comparison must indeed be striking to warrant relief. Only if it can be said that what was or was not done by the attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the court, can a charge of inadequate legal representation prevail."

See, also, Hickman v. United States, (8 Cir. 1957) 246 F.2d 178.

On October 9, 1968, the date the motion of defendant was filed, the court entered an order staying the execution of the sentence until October 22, 1968. Having fully considered the motion and the contentions of the defendant, the court is of the opinion that the motion should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the motion be and is denied in toto and that the defendant, Otto Lewis Meyer, surrender himself on October 22, 1968, to the custody of the United States Marshal for the Western District of Arkansas in execution of the judgment and sentence imposed upon him.

This 18th day of October, 1968.

/s/ Jno. E. Miller
United States Senior District Judge, Sitting by Designation

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNTED STATES OF AMERICA,
Plaintiff,
vs.
OTTO LEWIS MEYER,
Defendant.

Criminal Action No. 6163

Supplemental Memorandum and Order

On October 18, 1968, the court filed its Memorandum and Order by which the original motion of defendant filed October 9, 1968, "to set aside verdict and for a new trial and to stay execution" was denied in toto, and the defendant was ordered to surrender himself on October 22, 1968, to the custody of the United States Marshal for the Western District of Arkansas, in execution of the judgment and sentence imposed upon him.

On October 22, 1968, the defendant appeared by Mr. Owen C. Pearce, his attorney, and orally requested leave to file an amendment to his original motion, and upon consideration of the request the court entered the following order:

> "IT IS ORDERED that said request be and it is granted and said defendant is allowed a reasonable time in which to file said amendment.
>
> "IT IS FURTHER ORDERED that the defendant, Otto Lewis Meyer, be and he is permitted to remain at liberty on his present bond until further order of the court."

The memorandum and order of October 18 dealt with the allegations contained in the motion of October 9, and

reference is made to that memorandum and order for a statement of the contentions of defendant, the facts, and the applicable law.

On November 4, 1968, the defendant filed an amendment to his original motion of October 9, 1968, in which he reaffirmed and reasserted all of the allegations set forth in the original motion, and requested "that this court consider his motion for relief as one in the nature of a Writ of Error Coram Nobis pursuant to the All Writs Section, 28 U.S.C.A., Section 1651(a)."

In the original motion the defendant contended that his constitutional rights were violated because of the issuance and execution of a search warrant issued by the U. S. Commissioner at Jefferson City, Missouri, authorizing Robert E. Miller, or any other agent of the Federal Bureau of Investigation, to conduct the search on the premises known as "80 acres in name of Otto Lewis Meyer and Margie M. Meyer described as the W½ of NE¼ of Section 23, R. 19, Twp. 45, in Morgan County, in the Western District of Missouri." The affidavit upon which the warrant was issued was executed by Special Agent Rowen B. Ayers, and the affidavit recites that the affiant stated that he had "reason to believe * * * there is now being concealed certain property, namely,

"1. 1961 Lincoln Continental Motor Vehicle painted yellow and various other motor vehicles the description of which are not known.

"2. Materials, tools and equipment which have been or could be used in the manufacture of fraudulent identification numbers for motors, frames and motor vehicle identification plates.

"3. Forms, equipment, seals and materials which have been or could have been or could be used in preparing fraudulent Bills of Sales, Registration or other items necessary to title a motor vehicle."

In addition to the above statements, the affidavit further states: "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: See Appendix A attached." The attachment, Appendix A, contains 16 paragraphs, and sets forth various acts which it is charged the defendant committed. Apparently the statements made in Appendix A are based upon facts personally known to be true by the affiant.

The search warrant was issued in conformity with the affidavit, on August 12, 1966, and returned to the U. S. Commissioner on August 22, 1966. The return recites that a copy of the warrant was left with Mrs. Margie Meyer together with a receipt for the items seized. Attached to the return is not only Appendix A to the affidavit for search warrant, but also Appendix B which is a complete list of everything that was taken by the FBI agents.

On the day that the affidavit for the search warrant was filed, a complaint, Case No. 310, was filed before the U. S. Commissioner for the Western District of Missouri against Meyer and his co-defendant, Dwain Duggar. The preliminary hearing on that complaint was held on September 29, 1966, and the Commissioner found that the defendants had committed an offense, and they were released on bond to appear before the United States District Court at Fort Smith, Ark. Also, on the same date, another charge, Case No. 311, was made against the defendants and resulted in the same judgment. The certificate of the Commissioner also recites that on September 2, 1966, Cases Nos. 333, 334, 335 and 336 were filed against the defendants. Charges had also been filed against the defendants in the office of the U. S. Commissioner for the Western District of Arkansas, and on October 3, 1966, the last named four cases were dismissed or withdrawn because of the action taken by the Commissioner for the Western District of Missouri in Cases Nos. 310 and 311.

It is apparent that the defendant and his attorney, Mr. Lewis W. Pierce, were fully advised of the charges against the defendant before the indictment was returned by the Grand Jury of the Western District of Arkansas. The defendant and his attorney knew precisely every item that had been seized by the FBI agents, and which might be offered in evidence against defendant at the trial on the indictment. Notwithstanding this information, the defendant did not file any motion to suppress or for the delivery of the items seized.

At the trial, the Government called as a witness Mr. Rowen B. Ayers who, along with Agent Miller, made the search. Ayers testified (TR 236-241) that they found a garage, a produce house, and places where they kept rabbits and a trailer. The garage was a well-equipped commercial garage. Mr. Meyer was not present. He further testified that they recovered a notary stamp which had expired on January 31, 1966. Objection was made to the introduction of the notary stamp and the court sustained the objection.

Beginning at page 238 Mr. Ayers testified:

A. Among other things, I found a stamp, another rubber stamp in which the impression of Van T Chevrolet is inserted in the frame.

MR. PIERCE: We have no objection to that.

MR. GUTENSOHN: This will be Government's Exhibit 65.

Q. I will ask you in your search there what did you recover, what else did you recover?

MR. GUTENSOHN: I would like to introduce that as Government's Exhibit #65

MR. PIERCE: No objection.

(Government's Exhibit 65 introduced in evidence.)

A. We found some pads which I have no personal information of significance. They are called retail orders for motor vehicles, and some of them are filled out in part and have various names, including Van T Truck Center and Van T Chevrolet Company on them.

Q. Is that the book that you recovered, please?
A. This is one book and this is the other.
MR. PIERCE: I have no objection to them.
THE COURT: All right.

The Government introduced at the trial 79 exhibits, and the only exhibits offered pertaining to the property found in the search were as stated above.

In reality, the rights of the defendant, constitutional or otherwise, were not infringed by the search. The learned attorney representing the defendant realized that the Government was not aided in any manner in the prosecution of the charges by the search.

As heretofore stated, the amended motion now before the court reiterates and reaffirms the allegations contained in the original motion, and in addition thereto asks that the court consider the motion for relief as one in the nature of a writ of error coram nobis pursuant to the all writs section, 28 U.S.C.A., Section 1651(a). In view of all the facts supporting the charges against the defendant, it is immaterial whether the original motion was considered as a §2255 motion or as a motion in the nature of a writ of error coram nobis.

In Burns v. United States, (8 Cir. 1963) 321 F.2d 393, the court, in an opinion prepared by Hon. Gordon E. Young, U. S. District Judge of the Eastern District of Arkansas, sitting by designation, beginning at page 895 said:

"Appellant contends that the trial court erred in holding that the question of perjured testimony could

not be raised by the writ of coram nobis. The court below held that since the alleged perjured testimony was a matter outside the record and since jurisdiction conferred by 28 U.S.C. §2255 was available, it was unnecessary to entertain common law jurisdiction for relief in the nature of coram nobis. Indeed, the very purpose of Section 2255 is to restate, clarify and simplify the procedure in the nature of the ancient writ of coram nobis, thus providing an expeditious remedy for correcting erroneous sentences. United States v. Hayman, 342 U.S. 205, 215-220, 72 S.Ct. 263, 270-273, 96 L.Ed. 232 (1951). There is no gainsaying the fact that procedure under coram nobis is unclear. United States v. Morgan, 346 U.S. 513-520, 74 S.Ct. 253-257, 98 L.Ed. 248 (1953) (dissent). Now, appellant advances an argument which is purely procedural and complains that his petition should have been treated as a writ of coram nobis. Admittedly, Section 2255 should not be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. United States v. Morgan, 346 U.S. 502, 510, 74 S.Ct. 247, 252, 98 L.Ed. 248 (1953). Even so, as pointed out by the United States Supreme Court, in view of Section 2255 it is difficult to conceive a situation in a federal criminal case today where the remedy of coram nobis is necessary or even appropriate. United States v. Smith, 331 U.S. 469, 476, 67 S.Ct. 1330, 1334, 91 L.Ed. 1610 (1947). It is clear that a federal District Court is not bound by the label attached to the remedy pursued, but rather a duty exists to exercise jurisdiction on the basis of the factual circumstances involved. United States v. Morgan, supra, 346 U.S. at 505-510, 74 S.Ct. at 249-252. The ambiguity of the procedure under the remedy of coram nobis and the certainty under Section 2255 lead us to the logical preference of the latter where the facts involved establish jurisdiction under Section 2255 without any resulting prejudice.

"In the case at bar, the court below was justified in entertaining jurisdiction of appellant's petition under Section 2255. The petition constitutes a collateral

attack on appellant's conviction. Such collateral attack is within the purview of Section 2255. United States v. Hayman, supra, 342 U.S. at 219, 72 S.Ct. at 272. The function of coram nobis is for the correction of error of fact not apparent on the record and which, if known to the court, would have prevented the entry of judgment. Lipscomb v. United States, 273 F.2d 860, 865 (8th Cir. 1960). Perjured testimony induced by a prosecutor was a recognized ground for coram nobis at common law. Coram Nobis and the Convicted Innocent, 9 Ark. L. Rev. 118, 120 (1954). However, since the same issues sought to be raised by the petitioner under coram nobis can be and were considered on their merits by the court under §2255, clearly petitioner was not prejudiced and we cannot conclude that it was error for the District Court to consider this petition under §2255 instead of a petition for coram nobis. We, therefore, must reject appellant's contention."

In the amendment to the motion, the defendant cites only one case, United States v. Davis, (7 Cir. Sept. 18, 1968) ..... F.2d ..... An examination of the case discloses that there was before the court a motion to suppress the evidence obtained by a search warrant, whereas in the instant case the question of the sufficiency of the affidavit or the execution of the search warrant cannot be raised for the reasons stated in the memorandum and order of this court filed October 18, 1968.

In addition to the authorities cited to sustain the conclusion of the court in that memorandum, the court calls the attention of the parties to Footnote 1, page 643, of the opinion in United States v. Re, (2 Cir. 1967) 372 F.2d 641.

In Craig v. United States, (8 Cir. 1967) 376 F.2d 1009, the court at page 1010 said:

"At the trial resulting in the convictions, defendant's employed counsel moved to suppress the evidence upon asserted illegality of the search and seizure

but abandoned this issue on appeal. Additionally, it is obvious from the original record that the search and seizure were made under circumstances fully known to defendant prior to trial. Such being the case, this issue is not proper for consideration on defendant's §2255 motion. We said in Cox v. United States, 351 F.2d 280, 281 (8th Cir. 1965):

> " 'Likewise, the illegal search and seizure issue cannot be considered on a §2255 motion where, as here, the circumstances of the search and seizure were fully known to the defendant at the time of his trial resulting in his conviction.'
>
> "In Cox, supra, we quoted from Springer v. United States, 340 F.2d 950, 951 (8th Cir. 1965), and cited Peters v. United States, 312 F.2d 481, 482 (8th Cir. 1963) and Warren v. United States, 311 F.2d 673, 675 (8th Cir. 1963).
>
> "The District Court in its order overruling defendant's motion held that §2255 cannot be used as a substitute for appeal or for the purpose of litigating matters not raised on appeal. On this basis, the District Court held that defendant's present petition was without merit. We agree. The cases above referred to make clear that the conclusion reached by the District Court denying defendant's application for vacation of the sentences was proper."

See, also, Footnote 1 in Clemas v. United States, (8 Cir. 1967) 382 F.2d 403.

A consideration of all the facts and procedures shown by the record of the trial of defendant and the applicable law as set forth in the memorandum of October 18, 1968, and the memorandum of today convinces the court that the motion filed October 9 and the "amended motion" filed November 4 are without merit and should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the said motion and the amended motion be and the same are denied and that the defendant, Otto Lewis Meyer, surrender himself on November 22, 1968, to the custody of the United States Marshal for the Western District of Arkansas in execution of the judgment and sentence imposed upon him.

This 8th day of November, 1968.

/s/ Jno. E. Miller
United States Senior District
Judge, Sitting by Designation

APPENDIX B

Opinion

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,664

United States of America,
Appellee,
vs.
Otto Lewis Meyer,
John Dwain Dugger,
Appellant,
Larry Meyer.

Appeal from the United States District Court for the Western District of Arkansas.

[November 6, 1969.]

Before Matthes, Blackmun and Bright, Circuit Judges.

Matthes, Circuit Judge.

On July 27, 1967, appellant and Otto Lewis Meyer were found guilty on 10 counts of an indictment, nine charging substantive violations of the Dyer Act, 18 U.S.C. §2312, and one charging a conspiracy to violate that Act. From the judgments of conviction entered on October 4, 1967, Dugger and Meyer appealed. We affirmed. *Meyer* v. *United States,* 396 F.2d 279 (8th Cir. 1968). Meyer did not seek review by the Supreme Court. Appellant did. Certiorari was denied. 393 U.S. 1017 (1969).

Meyer unsuccessfully made a collateral attack upon his conviction in the district court. We affirmed. *Meyer* v. *United States,* ..... F.2d ..... (8th Cir. 1969).

We now have for consideration appellant's appeal from the district court's denial of his motion, filed pursuant to 28 U.S.C. §2255, seeking to vacate the judgment and sentence.

The sole question in issue for our determination, as framed by the appellant, is whether the district court was required in this proceeding to hold an evidentiary hearing to determine whether any of the items seized in a search of the premises of Meyer pursuant to a search warrant would or could have been beneficial to the defense. Specifically, appellant asserts that he should have been afforded the opportunity to inspect, through discovery proceedings, the items so obtained in order that he might determine whether they would have assisted him in preparing his defense. He claims his discovery rights under Rule 16(e), Fed. R. Crim. P., were violated; going further, he accuses the government of suppressing evidence favorable to him, contrary to the teachings of the Supreme Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). We hold that only a legal question was and is involved under the facts of this case, and that the district court was not required to hold such an evidentiary hearing.[1]

In light of the history of this case, particularly its posture in this court on appeal from the judgments of conviction, we find appellant's contention wholly lacking in substance. Reference to our opinion affirming on the merits will show that the identical question here relied upon was fully considered and rejected then. 396 F.2d at 283. Ex-

1. We note parenthetically that Meyer challenged the validity of the search warrant and the ensuing search in his post-conviction proceeding in the district court. In affirming the court's action refusing to vacate the judgment against him, we found that the search warrant was valid. This lays to rest the suggestion in appellant's brief that the search was "unconstitutional." Furthermore, since the search was directed against Meyer—not appellant—we doubt whether he has standing to question it. *Alderman* v. *United States*, 394 U.S. 165 (1969).

amination of appellant's petition for certiorari and the Solicitor General's memorandum in opposition thereto inform us that appellant urged the same error in that Court. As noted, certiorari was denied.

Judge Blackmun's pertinent observation in *Slawek* v. *United States*, 413 F.2d 957, 959-60 (8th Cir. 1969) is apposite here.

> "It is still the law, we take it, that matters so meticulously considered and decided on direct appeal need not be reconsidered and decided again on a §2255 proceeding." (Citing numerous cases.)

Contrary to appellant's suggestion, the trial proceedings and the record and files in this case clearly demonstrate that this is not a *Brady* v. *Maryland* situation.

We are convinced that appellant received a fair trial. He has been represented throughout by retained counsel skilled in the defense of criminal cases. He, like Otto Lewis Meyer, transgressed the law not once but ten times. Eventually he was caught and now must suffer the consequences of his misdeeds. Affirmed.

Our mandate shall issue forthwith and will not be stayed pending petitions for rehearing or certiorari.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPLICATION FOR RELEASE ON BOND PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner and moves this Honorable Court, or a Justice thereof, for an order under the authority of *Supreme Court Rule 27, Title 28, United States Code*, releasing the Petitioner upon bond pending disposition of his Petition for Writ of Certiorari filed herewith:

1. That Petitioner would incorporate herein the statements, arguments, and allegations contained in his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, to which this Application is appended.

2. That on or about the 10th day of December, 1969, Petitioner filed in the United States Court of Appeals for the Eighth Circuit his, "Motion for Stay of Mandate and for Release Upon Bail Pending Determination of Petition for Certiorari to The United States Supreme Court" which said motion was denied therein on December 23, 1969.

3. That the Petitioner is now in the custody of Attorney General, but until the issuance of the mandate below had been free on security bail bond and had appeared in Court upon each occasion as required.

4. That Petitioner was employed and the sole means of support of his family, and that he and his family will be greatly damaged and prejudiced if he is not allowed to be freed upon bond.

5. That Petitioner's release is authorized under *Section 2101(f), Title 28, United States Code,* and *Rules of the Supreme Court Numbers 27, 49 and 51.*

WHEREFORE, Petitioner respectfully moves this Court for an order setting bond and releasing Petitioner upon bond pending disposition of his Petition for Writ of Certiorari filed herein.

LEWIS E. PIERCE
ROBERT G. DUNCAN
J. ARNOT HILL
PIERCE, DUNCAN & HILL
1207 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

JOHN DWAIN DUGGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON APPLICATION FOR RELEASE ON BOND PENDING DISPOSITION OF THE PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Arkansas, petitioner and one Meyer were convicted on nine counts charging violation of the Dyer Act, 18 U.S.C. 2312, and one count of conspiracy. Petitioner was sentenced to ten years' imprisonment. The court of appeals affirmed, 396 F. 2d 279 (C.A. 8), and this Court denied certiorari, 393 U.S. 1017.

The present action arose by a motion under 28 U.S.C. 2255 to vacate sentence which the district court denied, on the files and records without a hearing, in

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an opinion relying on two previous rulings with respect to Meyer (Pet. App. A 1–11, 12–20).

The basic contention here—that the district court erred in failing to hold a hearing to determine whether any items seized pursuant to a search by warrant of the premises of co-defendant Meyer (while petitioner was not present) might have been beneficial to the defense—is patently insubstantial. This issue was fully canvassed and properly rejected on direct appeal (see 396 F. 2d 279, 283)[1] and was one of the issues raised in the certiorari petition which this Court denied in the 1968 Term (see No. 649). In these circumstances the denial of petitioner's motion without a hearing was amply justified.

Petitioner's reliance on cases such as *Kolod* v. *United States*, 390 U.S. 136, and *Alderman* v. *United States*, 394 U.S. 165, is wholly misconceived. Those cases dealt with evidence in the government's possession which had admittedly been seized in violation of the defendant's Fourth Amendment rights. Here, there was no violation of the Fourth Amendment rights of either defendant.[2]

---

[1] The government furnished the defense (in response to a motion for a bill of particulars) with an FBI worksheet containing information about thirty-nine automobiles alleged to have been transported by petitioner and co-defendant Meyer, including those that were the subject of the indictment. As the court of appeals pointed out on the direct appeal, this "information amply sufficed to permit defendants to adequately prepare for trial * * *." 396 F. 2d at 283.

[2] The search and seizure, which petitioner in any event has no standing to challenge, *Alderman* v. *United States*, 394 U.S. 165, was sustained in a separate opinion of the court of appeals as to Meyer, on which we rely. *United States* v. *Meyer*, C.A. 8, No. 19,546, decided October 30, 1969. We are lodging a copy of that opinion with the Clerk of this Court.

The petition for a writ of certiorari and the application for release on bond pending disposition of the petition should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970